

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROUGE STEEL CO,

Plaintiff-Appellant,

v

SULI & SONS CARTAGE INC,

Defendant-Appellee,

and

HAMILTON STEEL PRODUCTS INC,

Defendant-Appellee.

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UNPUBLISHED

July 20, 2004

No. 248537

Wayne Circuit Court

LC No. 01-112432-CK

Before: Zahra, P.J., Talbot and Wilder, JJ.

PER CURIAM.

Plaintiff, Rouge Steel Co (Rouge), appeals as of right from the trial court's order granting defendant, Suli & Sons Cartage Inc.'s (Suli) motion for summary disposition. On appeal, Rouge raises issues relating an earlier opinion and order that denied Rouge's motion for summary disposition and granted defendant, Hamilton Steel Products Inc. (Hamilton), summary disposition. We affirm.

**I. Basic Facts and Procedure**

Hamilton entered into agreement with Rouge to purchase secondary steel. The agreement included an indemnification provision, which states in relevant part:

If buyer is required, by the terms of this agreement, to perform or does perform, any work on seller's premises, buyer agrees that buyer shall be exclusively responsible for any damages or injuries to persons or property, including seller's employees and the property including the loss of use of such property, that occur as a result of the fault or negligence of buyer, its agents, servants, or employees in connection with the performance of such work and buyer shall save harmless and indemnify seller from and against all personal liability from such damages or injuries. . .

Hamilton paid Suli to pick up the steel from Rouge. On December 12, 1998, Tase Anastasov, an owner/truck driver of Suli drove to the Dearborn Rouge plant to pick up steel for Hamilton, and, while there, Anastasov allegedly slipped on oil and fell onto a steel coil injuring his arm. Anastasov filed a negligence action against Rouge in Wayne Circuit Court. Rouge's answer to the underlying action complaint included an affirmative defense based on Anastasov's alleged comparative negligence.

Rouge then filed the instant action against Hamilton based upon the indemnity provision and requested Hamilton indemnify Rouge from all claims brought by Anastasov. Rouge alleged that Anastasov was an agent of Hamilton because Hamilton had subcontracted with Suli, who employed Anastasov.

Rouge and Hamilton filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court ruled in favor of Hamilton, holding:

In the Anastasov suit for which Rouge seeks indemnity, the complaint alleges negligence against Rouge and Ford Motor Company only. Hamilton is not mentioned in the complaint. Rouge has not otherwise demonstrated any negligence on Hamilton.

Because the record is devoid of any wrongdoing on Hamilton, the Court cannot give effect to the indemnification provision in the manner that Rouge seeks. Hamilton agreed to indemnify Rouge for its (Hamilton's) negligence only. In the absence of such wrongdoing, Rouge has no right to indemnification from Hamilton. Thus, Hamilton is entitled to summary disposition as requested. [citations omitted.]

## II. Contractual Indemnity

Rouge argues the trial court erred in finding the indemnification provisions did not require Hamilton to indemnify Rouge against liability in the underlying action. We disagree.

### A. Standard of Review

We review de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 163. The trial court must consider affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 164. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164.

### B. Analysis

An indemnity contract is construed in the same manner as other contracts. *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). In construing a contract, "a court will ascertain the intent of the parties both from

the language used and from the surrounding circumstances.” *Ormsby v Capital Welding, Inc.*, 255 Mich App 165, 192; 660 NW2d 730 (2003), lv granted 469 Mich 947; 671 NW2d 55, quoting *Zurich Ins Co v CCR & Co (On Reconsideration)*, 226 Mich App 599, 607, 576 NW2d 392 (1997). Broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from “other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties.” *Fischbach-Natkin Co v Power Process Piping, Inc.*, 157 Mich App 448, 452; 403 NW2d 569 (1987).

We conclude that the trial court properly dismissed this case because Rouge has failed to show liability in the underlying action, which has been dismissed. It is well settled that an action for indemnity accrues when liability of the indemnitee becomes fixed (contract of indemnity against liability), or when the indemnitee has suffered an actual loss or damages (contract of indemnity against loss or damage). *Sherman v Spalding*, 132 Mich 249, 251; 93 NW613 (1903); See also Michigan Law & Practice Encyclopedia, 2<sup>nd</sup> ed, Indemnity, § 3; 41 Am Jur 2d, Indemnity §§ 43-44; and Michigan Practice and Pleading, Evidence, Indemnity, § 36.228, citing *Richards v FC Matthews & Co*, 256 Mich 159, 164; 239 NW2d 381 (1931) and *Cohen v London Guarantee & Accident Co, Ltd, of London England*, 247 Mich 226; 225 NW549 (1929). Here, there is no evidence of a judgment entered against Rouge, and Rouge has not alleged an actual loss or damage. Rouge’s indemnity action has not yet accrued and cannot be maintained. Therefore, we initially conclude the trial court’s decision was proper because Rouge failed to show a right to contractual indemnity.

Moreover, we agree with the trial court that the language of the indemnification provision “indicates Hamilton accepted liability for negligence on its part only, and not for others.” Rouge’s interpretation ignores the phrase, “occur as a result of the fault or negligence of [Hamilton], its agents, servants, or employees in connection with the performance of such work. . . .” This phrase evidences that Hamilton need not indemnify Rouge against any negligence. Rather, the phrase limits Hamilton’s liability to the negligence of Hamilton, “its agents, servants, or employees in connection with the performance of such work.” In addition, contrary to the instant case, case-law relied on by Rouge contains indemnification provisions indicating the indemnitor accepted liability for the negligent acts of others. See *Sherman v DeMaria Building Co*, 203 Mich App 593, 597; 513 NW2d 187 (1994); *Fischbach-Natkin Co, supra* at 451-452; 403 NW2d 569 (1987). Therefore, the trial court properly denied Rouge motion for summary disposition because Hamilton need not indemnify Rouge, except for the negligence of Hamilton, “its agents, servants, or employees in connection with the performance of such work.”

Rouge alternatively argues that, under the indemnification provision, because Anastasov was comparatively negligent, Hamilton must completely indemnify Rouge. We disagree.

Here, Rouge failed to present evidence that Anastasov’s negligence caused his injury. Rouge relies on its answer in the underlying action as support for its claim that Anastasov was comparatively negligent. However, when the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). There is no evidence of Anastasov’s negligence, and therefore, the trial court properly granted Hamilton’s motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder